No. 15963

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIRE B. MORSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

This appeal involves the asserted liability of appellant for income and excess profits taxes of a corporation for the calendar year 1942 and the period January 1, 1943, to April 30, 1943.

Appellant is an individual residing in Los Angeles, California [R. 4].

The suit was instituted by appellee, by way of a suit in intervention. The jurisdiction of the District Court was asserted by appellee under Title 28, United States Code, Sections 1340 and 1345, and Title 26, United States Code, Section 7401 [R. 4].

Judgment was entered in favor of appellee on February 17, 1958 [R. 58]. A motion for new trial was filed on February 21, 1958 [R. 65]. The motion was heard

March 3, 1958 [R. 59], and denied on the same date.* Notice of appeal was filed March 7, 1958 [R. 71]. The jurisdiction of this Court is based on 28 U. S. C., Section 1291.

Questions Presented.

The question here is whether appellant is liable as a transferee for income and excess profits taxes of Borin Art Products Corporation, and, if so, the amount of such liability.

Statutes Involved.

The statutes involved in this proceeding are set forth in the Appendix, *infra.*

Statement.

Because of the many separate issues raised by this appeal the facts pertinent to each issue are stated in connection with the argument on that issue. The facts are there also keyed to the record. Because of this only a general and introductory statement is included here.

This is a proceeding for collection of income and excess profits taxes from appellant as alleged transferee of an Illinois corporation, located in Illinois, and known as Borin Art Products Corporation [R. 4, 11]. That corporation was incorporated in September, 1932 [R. 89]. In November, 1933, appellant married Nathan Borin of that corporation [R. 83]. As of May 1, 1943, the corporation was dissolved and replaced by an alleged partnership under the name of Borin Art Products Company [R. 49]. Appel-

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*See page 4 of unprinted transcript of proceedings March 3, 1958. The written order of denial was filed on March 11, 1958 [R. 70].

lant, however, did not know that this occurred until two years later, when she began suit against Nathan Borin for divorce and in that connection discovered certain documents at her home which she turned over to her attorneys in the divorce action [R. 86-87].

The documents apparently indicated to the attorneys that on the books of the business she was shown as having some interest in it although this was the first she knew about that [R. 88].

As the evidence and the Findings show, the so-called partnership agreement under which the alleged partnership was formed was not signed by her, nor did she authorize anyone to sign it for her [R. 55, 82-83]. As indicated above, she did not even know that it had been formed. Not only did she have no connection with the agreement; what purports to be her signature on it is an attempted simulation of her actual signature and therefore a forgery [R. 81-83].

The attorneys in the divorce proceeding told appellant that according to the documents she had some interest in the alleged partnership [R. 88], and in aid of the action for divorce she signed pleadings, as she had previously signed other business papers, without examining them [R. 95], in faith that her attorneys were doing what was necessary in connection with a divorce [R. 97-98, 109].

Although the purported partnership agreement listed her as a shareholder of the predecessor corporation and as a limited member of the partnership, she at no time knew that she was, and never at any time received anything from the corporation either as dividends or in liquidation [R. 50, Fndg. IX, R. 94], nor did she ever receive anything from the alleged partnership [R. 55, Fndg. XX,

R. 94], although over a period of three and one-half years Nathan Borin drew out of it more than $300,000.00 [R. 151].

Her divorce proceedings dragged over several years and she was finally divorced from Nathan Borin in 1949 [R. 84]. Later she married a Mr. Buchman so that her name became Claire Buchman [R. 83]. Her present name is, of course, shown in this proceeding.

In 1946, during the pendency of the divorce proceeding the plant of the alleged partnership, Borin Art Products Company, was destroyed by a fire [R. 160-161]. Although there was insurance paid in the total amount of $900,000.00 [R. 105], and also, as indicated above, Nathan Borin drew out of the partnership over a three and one-half year period over $300,000.00, appellant, as the Findings show, never received anything.

After the dissolution of Borin Art Products Corporation additional income and excess profits taxes were determined against it for the years 1940 and 1941, and also 1942 and the portion of 1943 prior to its dissolution. The taxes for 1940 and 1941 were paid in full [R. 13]. As to the taxes for 1942 and 1943 the government first proceeded on the basis that the alleged partnership was a mere fiction and the *alter ego* of Nathan Borin. As late as March 30, 1950, it formally advised appellant that this was its holding and that income of the so-called partnership was the income of Nathan Borin [R. 13]. But the government found itself unable to collect the taxes still due from the alleged partnership as the *alter ego* of Nathan Borin and so reversed itself and took the position that the partnership was valid and that the purported limited partners were liable for the taxes [R. 105].

In respect to a portion of the corporation's taxes for 1942 and 1943, appellant signed a waiver form under the provisions of the Internal Revenue Code for waiver of the right of appeal to the Tax Court. There is strong evidence, however, that appellant signed that document, together with two extensions of time in respect to individual taxes, under the representation and in the belief that all three documents were merely extensions of time like those which she had been filing constantly on the recommendation of her attorney or accountant [R. 152].

An assessment was made against appellant on the basis of that waiver, and this proceeding is an action by the United States for collection of that assessment. A proceeding previously filed by appellant for injunction is, the parties have agreed, now moot and this proceeding consists only of the said suit by the United States for collection [R. 48].

In the course of this action there was a pretrial conference, a pretrial conference order [R. 10-19], and a trial. After the trial appellant submitted proposed Findings so as to cover all pertinent parts of the evidence [R. 24-32]. The trial court, however, disregarded those proposed Findings entirely and signed the Findings submitted by appellee [R. 47-58]. A request was made by appellant for a new trial on the basis of surprise in connection with certain of those Findings and certain exhibits [R. 59-65, 69-70], but the request was denied [R. 70].

It was conceded by appellee, and the trial court found, that appellant never in fact received anything from either the corporation or the partnership [R. 50, 55, 105]. The trial court also found that she did not sign the partnership agreement and that no one was authorized by her to sign it for her [R. 53]. Nevertheless, it held that she was

obligated under the agreement on the basis of estoppel, primarily because of her conduct, in the course of her divorce proceedings, of signing a complaint for dissolution of the alleged partnership [R. 56, 129-130]. The court conceded that she knew nothing about the action herself and that the proceeding was one concocted by her attorneys [R. 130]. The trial court also found and appellee conceded that she never got anything [R. 55, 105, 132]. In fact, it was indicated that the proceeding was not in fact ever prosecuted [R. 101]. Nevertheless, the trial court held that she was *estopped,* because of that proceeding, from denying the partnership [R. 135-136].

It is in this posture that this cause is now before this court. As noted at the outset of this statement the facts pertaining to any issue are stated in greater detail in connection with the argument on that issue.

Specifications of Error.

The court below erred as follows:

1. In finding that appellant prior to the dissolution of Borin Art Products Corporation was the owner of 80 shares of stock of said corporation.

2. In assuming for the purpose of its Findings that the purported partnership known as Borin Art Products Company was a true and bona fide partnership.

3. In finding that appellant received a 10 per cent interest in the said partnership.

4. In finding that appellant received such an interest for stock of said corporation.

5. In finding that the said interest was worth $12,000.00, or any part thereof.

6. In finding that

> "subsequent to the execution of the partnership agreement, she [appellant] recognized and ratified the partnership agreement, and became obligated thereunder, as fully as though she had personally placed her signature thereon at the time of its execution."

7. In concluding that appellant was estopped to deny the said partnership.

8. In finding that appellant was liable at all in the absence of pleading or proof of nonpayment of the taxes of said Borin Art Products Corporation.

9. In concluding that appellant was liable as transferee for the taxes of Borin Art Products Corporation.

10. In assuming that the burden of proof was upon appellant.

Summary of Argument.

The burden of proof that appellant had received assets of Borin Art Products Corporation as transferee was upon appellee. In any case, in view of the clear and cogent evidence introduced by appellant showing that she was never a stockholder of Borin Art Products Corporation, nor a member of the purported successor partnership, Borin Art Products Company, and that she never received any money or property of any kind from either the said corporation or the said partnership, the burden of proof that she had received assets from the said corporation as a transferee was upon appellee.

The parties stipulated, and the trial court found, that all of the assets of the said corporation were transferred, subject to its liabilities, to the purported partnership, Borin Art Products Company. What the trial court found

she had received was an interest as limited partner in the said partnership.

The parties stipulated, however, in the pretrial conference order that prior to and at the time of transfer of assets by said corporation to said partnership, the said partnership was the sole stockholder of the said corporation. It necessarily follows that appellant was not a shareholder of the said corporation, that she did not as a shareholder receive any of its assets, and that if she did receive an interest in the said partnership she did not receive it from the corporation. Indeed, the trial court failed to find that she had received even the said interest from the corporation.

Appellee admitted that the stock which it contended was acquired by appellant was acquired by her without her knowledge as a part of the scheme for dissolution of the corporation and creating the partnership. That admission is binding upon appellee and negatives any real ownership of stock by appellant.

Even as to a nominal ownership of stock there is no reference whatever in the record except in (a) an alleged partnership agreement which the evidence shows clearly was forged—said document having been introduced by appellant but only for the purpose of showing the forgery —and (b) an abstract not prepared by appellant, or anyone on her behalf, of a pleading in a divorce action which the trial court held again and again was immaterial. Because of such repeated holding by the trial court that the said abstract was immaterial, appellant failed to move during the trial to strike it, so that on the Court's finding of such stock ownership by appellant, appellant was caught by surprise and her motion for new trial on that basis should have been granted.

As to the trial court's holding that appellant had received an interest in the alleged partnership, it further erred for the reason that the alleged partnership was not a true and bona fide partnership but a mere sham and the *alter ego* of Nathan Borin. Appellee itself treated it as a sham as long as Nathan Borin was still solvent and could pay the higher taxes computed on that basis. As soon as the partnership "fell on its face" and Nathan Borin no longer had funds, appellee shifted its position and attempted to hold the purported limited members of the partnership, including appellant.

Appellee's own evidence shows that the partnership was a mere sham and the *alter ego* of Nathan Borin. Additional evidence in support of that conclusion contained in an exemplified copy of appellant's decree of divorce was offered by appellant and should have been admitted. Even the purported partnership agreement shows on its face that the partnership was a sham and the mere *alter ego* of Nathan Borin. Finally, the trial court itself stated several times in the course of the trial that it regarded the partnership as a sham.

It is clear from the evidence that appellant never actually received any interest in the alleged partnership. Also there is no evidence to show what the interest, if any, was worth, except for evidence indicating that it was worthless. Furthermore, since it is clear that if appellant ever did receive such an interest she did not receive it from the corporation, she is not because of it liable as a transferee.

The trial court found as facts that appellant never received any money or property from the corporation, nor from the alleged partnership. Indeed, it did not find that she had in fact received even an interest in the alleged partnership but held her liable on the ground that after

the alleged partnership had been formed she acted as if she was a member. The trial court based its conclusion explicitly and entirely on the ground of estoppel.

However, the record is completely devoid of any evidence supporting an estoppel. There were no acts of appellant upon which appellee relied to its injury, and, as the Court itself found, she never received any benefits from either the corporation or the partnership. On the contrary, the Court repeatedly held that the equities were in her favor, and long after any of the acts of appellant relied on by appellee, appellee made a formal determination that the partnership was a sham and that Nathan Borin was its real owner. In addition, estoppel must be pleaded and there is no such pleading by appellee.

Appellee also failed to plead or prove that the taxes of Borin Art Products Corporation had not in fact been paid. There is not even a Finding to that effect and this is necessary to support transferee liability.

Furthermore, even if appellant was a limited partner, a limited partner under the law of the State of Illinois, which is applicable here, is not liable for any of the debts of the partnership. Moreover, if appellant did receive any assets as a transferee, her resulting liability was exhausted by the payments made, after the transfer of assets by the corporation, for her account, in respect of the corporate taxes of years prior to those here involved.

ARGUMENT.

I.

The Trial Court Erred in Assuming as a Matter of Law That Appellant Had the Burden of Proving That She Was Not Liable as Transferee of the Assets of Borin Art Products Corporation.

The assumption referred to is shown at R. 56, Conclusions of Law, paragraph II. The Court there stated:

> "The defendant has not sustained her burden of proving that she is not liable, at law or in equity, as transferee of the assets of Borin Art Products Corporation, for deficiencies in taxes assessed against said Corporation."

In thus assuming that the burden of proof was on appellant the trial court erred.

A. In Any Transferee Case the Burden of Proof of Transferee Liability Is Entirely Upon the Government.

In a transferee proceeding before the Tax Court the burden of proof is expressly upon the government to show liability as transferee. (I. R. C. 1954, Section 6902(a); I. R. C. 1939, Section 1119(a).) But this is only a statement of what the rule has always been in all courts in connection with burden of proof in transferee cases.

Prior to the enactment of provisions giving the Tax Court jurisdiction in transferee cases the government's procedure in such cases was by a bill in equity. (*Phillips v. Commissioner,* 283 U. S. 589, 592, 51 S. Ct. 608, 610.) In such a proceeding the burden of proof was, of course, upon the government. (*United States v. Lam* (D. C., W. D., Ky., 1927), 26 F. 2d 830; 9 Mertens, Sec. 53.45.) The purpose of the express provision respecting burden of

proof before the Tax Court was merely to leave the burden of proof where it theretofore was in transferee cases. (9 Mertens, Sec. 53.45.)

It was in the same manner that this Court and other courts reached a conclusion in fraud cases that even on a suit for refund by the taxpayer the burden of proof in respect of fraud was upon the government. (*Ohlinger v. United States* (C. A. 9), 219 F. 2d 310, citing and quoting from *Vitelli & Son,* 250 U. S. 355.) As it was also shown in the *Vitelli* case, as summarized in *Ohlinger,* if the burden with respect to fraud were placed on the taxpayer it would involve proof of a negative, and the same situation obtains with respect to transferee liability.

It follows that the District Court erred as a matter of law in assuming that the burden was upon appellant to prove that she was not liable as a transferee of the assets of Borin Art Products Corporation.

B. In Any Event, the Assessment Notice Here Operated at Most as a Presumption and Since Substantial Evidence Supporting the Taxpayer Was Introduced, the Burden Shifted to the Government.

1.

It is significant in this connection that the trial court failed in its obligation under F. R. C. P., Rule 52, "to find the facts specially," by failing to include in its findings all the pertinent and uncontradicted facts shown by the evidence, as detailed in the proposed findings [R. 24-32], filed by appellant.

A brief rundown of those proposed Findings, and the citations keying them to the record, shows that all of them are pertinent, and that most of them are wholly uncontradicted. We shall not burden the Court by repeating them

here. They are all shown in the various factual elements given in this brief and likewise keyed to the record.

The trial court, however, completely disregarded these proposed Findings of appellant and signed the Findings as prepared by appellee.

We submit that in so doing the trial court failed in its obligation to find all the facts.

This proceeding is in effect one in equity. (*Phillips-Jones Corporation v. Parmley,* 302 U. S. 233, 235, 58 S. Ct. 197, 198; *Winger v. Chicago Bank,* 394 Ill. 94, 110.) It follows that "there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion . . . can rationally be predicated." (*Kelley v. Everglades Drainage District,* 319 U. S. 415, 420, 63 S. Ct. 1141, 1144.) It is the duty of the District Court "appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case. . . ." (*Interstate Circuit v. United States,* 304 U. S. 55, 56, 58 S. Ct. 768, 769.)

Especially in connection with burden of proof it is important for the Findings to show all of the pertinent facts that were proved. We submit again that the trial court failed in its obligation to find the facts.

2.

The proceeding here having been reduced before trial to the proceeding in intervention [R. 48, par. III], appellee was in effect the plaintiff. In other words, appellee was in the position of suing for taxes allegedly due it. In such a suit the assessment has only a *prima facie* effect (*United States v. Rindskopf,* 105 U. S. 418, 26 S. Ct. 1131; *Williamsport Wire Rope Co. v. United States,* 277 U. S. 551,

48 S. Ct. 587; *Wickwire v. United States,* 275 U. S. 101, 48 S. Ct. 43; *I. B. Whetstone v. United States* (D. C. N. D., Ill.), 56-1 U. S. T. C. par. 9424, cert. den. 352 U. S. 879, 77 S. Ct. 101); and that effect disappears as soon as any substantial evidence is introduced by the taxpayer. (*St. Louis Union Trust Company v. Becker* (C. A. 8), 76 F. 2d 851, affirmed 296 U. S. 48, 56 S. Ct. 78.) Here not only substantial but very clear evidence was introduced in support of appellant.

In the first place, it was stipulated by the parties in the pretrial order that all of the assets of the corporation were transferred to an entity known as Borin Art Products Company [R. 12, par. 5]. It was also stipulated in the pretrial order that prior to and at the time of said transfer the said entity was the sole shareholder of the corporation [R. 12, par. 7]. It follows of necessity that none of the assets of the corporation were transferred to appellant. The binding effect of these stipulations we shall consider at another point, *infra.* For the purpose of this part of the brief these stipulations are referred to only as being substantial evidence.

In the second place, evidence to the same effect was elicited by the Court itself in the course of interrogating appellant. We refer to the following at R. 85:

> "The Court: Did you ever own any stock in the corporation?
>
> The Witness: No, never owned anything.
>
> * * * * * * * *
>
> The Court: Did you ever receive any dividends from the corporation?
>
> The Witness: No, your Honor, never received anything.

The Court: Then the corporation was liquidated, wasn't it?

The Witness: I never knew anything about his [Nathan Borin's] business, your Honor. He never discussed his business with me.

The Court: When this so-called partnership was formed, were you given a copy of the partnership agreement?

The Witness: I never knew it was formed. I never knew anything about it, nothing."

In the third place, appellee, by its counsel, admitted in open court [R. 136]:

"However, in the partnership where each of their proportionate shares in the corporation—the shares in the corporation, which she [appellant] acquired, by the way, she may not have had knowledge of at the time, but she acquired prior to the dissolution of the corporation as part of the scheme for dissolution of the corporation and creating the partnership."

The binding effect of this admission, too, we shall consider at another point, *infra*. For the purpose here we are treating it as substantial evidence. What it says is that there was a transfer of stock into appellant's name, of which she may have had no knowledge, and therefore without delivery [R. 89], which transfer was made "as part of the scheme for dissolution of the corporation and creating the partnership." That such a device is a mere sham and establishes no prior ownership of stock has been shown in *Commissioner v. Tower,* 327 U. S. 280, 66 S. Ct. 532, and *R. E. L. Finley v. Commissioner* (C. A. 10), 58-1 U. S. T. C. par. 9517.

As a fourth item of such evidence there is the completely uncontradicted testimony of a handwriting expert, not

only that appellant did not sign the partnership agreement, which the Court below found, but also that the attempt was made on the document to simulate her signature, so that in fact it was forged. We refer to the testimony of Mr. Harris [R. 81-83], whom appellee stipulated [R. 81] was qualified as a handwriting expert.

In the fifth place, the assessment itself rests on very infirm ground. It was stipulated here that no notice of deficiency in respect of the taxes involved was ever sent to appellant [R. 12, par. 8]. It follows that without a valid and effective waiver of such notice and of the right of appeal to the Tax Court the assessment involved here was invalid. (I. R. C. 1939, Sec. 272(a)(1), (d), made applicable to transferee liability by I. R. C. 1939, Sec. 311(a); *Steiner v. Nelson* (C. A. 7, Oct. 16, 1958), 58-2 U. S. T. C. par. 9871.)

To begin with, such a waiver is ineffective unless actually filed with the Commissioner, as the statute requires (*Steiner v. Nelson, supra*), and there is no evidence or Finding here that the waiver was so filed. As a second factor, there was clear evidence that appellant misunderstood the waiver document as a mere extension of time.* In that connection the trial court erred in its Finding of the said waiver [R. 52, Fndg. XII], over appellant's objections [R. 36-38], and in including only a part of the waiver document and omitting the top and bottom which showed that it was merely a waiver of the right to petition the Tax Court under I. R. C. 1939, Section

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*The waiver form referred to at R. 91-92, as part of Appellant's Exhibit 8 for Identification, was later introduced by appellee, over appellant's objections, as its Exhibit Z [R. 128-129]. The letter of March 13, 1951, referred to at R. 92 and again at R. 118 and 127, is shown in full at R. 152-153.

272(a), as described in *Flora v. United States,* 355 U. S. 881, 78 S. Ct. 1079.* In that connection the trial court also erred in refusing [R. 127] to admit appellant's Exhibit 13 for identification [R. 152-153] bearing out testimony by appellant [R. 91-93] that she thought the waiver was simply one of the many extensions of time which she was requested to sign [R. 96] and that she was misled into believing that this document was such an extension of time. It is clear from the evidence that appellant had no knowledge of the meaning of these documents, except that she thought they were all waivers of time [R. 91-93, 96].

Thus with this substantial evidence that appellant never owned an interest in the corporation, that she didn't know that the corporation was dissolved or the partnership formed, that the dissolution of the corporation and formation of the partnership was just a scheme, and that the parties who did carry through that scheme forged her signature on the purported partnership agreement, and the further fact that the assessment itself resulted from a mistake by appellant in signing a waiver of her right to petition the Tax Court in the belief that it was a mere extension of time, clearly the *prima facie* effect of the assessment was dissipated and the burden was placed on the government to prove that appellant had received assets as transferee of Borin Art Products Corporation.

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*The entire waiver form is contained in the record on appeal. Appellant will request its printing if appellee or the court desires it.

C. The Present Suit by the Government Is Predicated Upon Fraud, in Fact or in Law, and the Derivative Trust Fund Doctrine Is Inapplicable Here Under the Evidence; It Results That the Assessment Gives Appellee No Support and the Burden of Proof Is Upon Appellee.

The question whether or not a person is liable as a transferee of a taxpayer is governed not by federal law but by the applicable law of the state in which the transfer is alleged to have taken place. (*Commissioner v. Stern,* 355 U. S. 810, 78 S. Ct. 1047, 1051; *United States v. Bess,* 355 U. S. 861, 78 S. Ct. 1054, 1056; *United States v. Truax* (C. A. 5), 223 F. 2d 229.)

The alleged transferor here was an Illinois corporation [R. 11], located in Illinois [R. 4], and at the time of the alleged transfer appellant was a resident of Chicago, Illinois [R. 142]. The transfer was to an alleged partnership, Borin Art Products Company [R. 49], also located in Illinois [R. 172]. We shall show under Point III below that the said alleged partnership was a sham and the *alter ego* of Nathan Borin. For the purpose here we shall assume that it was what it purported to be.

Under the law of Illinois, as is true under the law of most states, transferee liability arises from a transfer in fraud of creditors, either in fact or in law. (*Bouton v. Smith,* 113 Ill. 481; *Landers, Frary & Clark v. Vischer Products Co.* (D. C., Ill), 104 Fed. Supp. 411, affirmed (C. A. 7), 201 F. 2d 319; *LaCrosse Mfg. Co. v. Spring,* 323 Ill. App. 525, 56 N. E. 2d 146.) In a suit involving taxes on the basis of fraud the burden of proof is upon the government. This applies even to suits by taxpayers for refunds, for the reason that fraud is never implied. It must always be proved by the person alleging it, whether plaintiff or defendant. (*Ohlinger v. United States, supra.*)

It is true that because a voluntary transfer by a corporation of all of its assets leaving creditors unpaid is a fraud in law against the creditors, such assets become a trust fund for the benefit of creditors, and may be followed by them. (*Winger v. Chicago Bank, supra.*)

The trust fund doctrine, however, is one sounding in equity, and an action based upon it is in equity. (*Winger v. Chicago Bank, supra,* 394 Ill. at 111; *Phillips-Jones Corp. v. Parmley, supra,* 302 U. S. at 235, 58 S. Ct. at 198.) Here, however, there is no equity to support the trust fund doctrine. There is a Finding here [R. 50, Fndg. IX] that appellant never received any of the money, property, or assets of the corporation.* There is also a Finding that she did not sign the document referred to in the Findings as the partnership agreement nor did she authorize anyone to sign it for her [R. 53, Fndg. XVI]. It is also clear from the evidence that her signature placed upon the document was a forgery. It was not simply that her name was signed there by someone else but that it was signed with the intention of having it appear to be her signature [R. 81-83].

The trial court also found that appellant never received anything from the alleged partnership either [R. 55, Fndg. XX].** It found that "she didn't get any benefits" [R. 132], that on the contrary the equities in this proceeding were in her favor [R. 131, 132]. Indeed, the trial judge went so far as to say that he was sorry for appellant [R. 119, 139], that she was "being called on to pay a tax on something she didn't get" [R. 130], "upon property she

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*Direct testimony on this is shown at R. 85 and 94.

**Direct testimony on this is given at R. 94.

didn't actually receive" [R. 131], but that he had been told by this Court not to do equity [R. 132], and that he would like to see this Court reverse him from an equitable standpoint [R. 131].

In that state of the record, as the authorities above show, the trust fund doctrine has no application. It results that the assessment must rest upon a charge of actual fraud, so that the burden of proof was wholly upon appellee.

It is clear that the trial court erred in assuming, as it did, that the burden of proof here was upon appellant.

II.

The Court's Finding That Appellant "Prior to the Dissolution of Said Corporation" Was the "Owner of Eighty (80) Shares of Stock of Said Borin Art Products Corporation" Is Contrary to the Evidence.

The reference under this point is to Finding VII [R. 49].

A. The Stipulation in the Pretrial Conference Order That Prior to and at the Time of the Transfer of Assets by Said Borin Art Products Corporation the Entire Stock of Said Corporation Was Owned by an Entity Known as Borin Art Products Company, Shows What Actually Occurred and Is Binding Upon Appellee and the Court.

It is a truism in tax law that what actually was done governs. (*United States v. Phellis,* 257 U. S. 156, 172, 42 S. Ct. 63. To the same effect, *Koch v. United States* (C. A. 9), decided 9/12/58, 58-2 U. S. T. C. par. 9831.) In the *Koch* case there was involved a partnership agreement and the question was whether the firm was in the picture making field, as the partnership agreement pro-

vided, or was not in that field, as its actual activities showed. This Court there stated:

> "The jury, irrespective of the partnership agreement, had a right to view the activities of Maurice P. Koch to determine whether he was acting individually or as a representative of one or another of the corporations or for the partnership."

In another case, *Vendig v. Commissioner* (C. A. 2), 229 F. 2d 93, all the outstanding stock of a sales corporation was owned by a parent corporation and an individual, and the individual transfered her sales corporation stock to the parent corporation. She received in return similar stock issued by the parent corporation, and then that corporation, as sole stockholder of the sales corporation, received upon liquidation thereof all of its assets subject to its liabilities for income taxes. It was held there that the individual stockholder did not receive any property of the sales corporation and was not its transferee. The individual did receive stock of the transferee corporation but she did not receive it from the transferor corporation. Therefore, it was held that she was not liable as a transferee.

In still another case, *Jacob, et al. v. Commissioner* (C. A. 9), 139 F. 2d 277, stock was placed by its owner in the names of certain other members of his family but he retained the certificates and when the corporation distributed its assets they were actually received by him. This Court there called it an "Indian gift." It accordingly held that there was no transferee liability on the part of the persons in whose names the stock appeared.

The question here therefore is what actually happened and the parties have stipulated as to what actually happened.

What the parties have stipulated is that (a) the assets were transferred by the corporation to an entity known as Borin Art Products Company, and (b) that prior to and at the time of said transfer the Borin Art Products Company was the sole shareholder of the corporation [R. 12, par. 7]. It must follow that no part of the assets was transferred to appellant, and that if appellant had an interest in the alleged partnership, Borin Art Products Company, she did not get that interest from the corporation. (*Vendig v. Commissioner, supra.*)

Even the Findings [R. 50, Fndg. IX] clearly say that appellant did not receive any of the money, property, or assets of the corporation and they fail to spell out any receipt by her, of an interest in the alleged partnership, *from the corporation.*

The stipulation referred to in the pretrial conference order is binding upon the parties, and the Court may not find to the contrary. (Cyc. Fed. Proc., Vol. 9, Secs. 31.06, 31.43; *H. Hackfeld v. United States,* 197 U. S. 442, 25 S. Ct. 456; *Andrews v. Hotel Sherman* (C. A. 7), 138 F. 2d 524; *Globe Cereal Mills v. Scrivenor* (C. A. 10, 1956), 240 F. 2d 330; *Curto v. International Longshoremen and Warehousemens' Union* (D. C., Ore., 1952), 107 Fed. Supp. 805, affirmed (C. A. 9), 226 F. 2d 875, *cert. den.* 351 U. S. 963, 76 S. Ct. 1026; *United States v. Sinor* (C. A. 5), 238 F. 2d 271.) It is true that a stipulation may be modified by the Court to prevent manifest injustice (Cyc. Fed. Proc., Vol. 9, Sec. 31.43), but here the trial court has said again and again that the equities were in appellant's favor. We quote especially the following statement of the trial judge at R. 130:

> "My sympathy is with Mrs. Borin. I think she is being called upon to pay a tax on something she didn't get."

And the following at R. 132:

> "Mr. Altman, in the past eight years I have decided a number of law cases upon equity, and the Circuit tells me I shouldn't do equity, that I should follow the law. I think the equity is in favor of your client."

We are not saying that there is evidence contrary to the stipulation. We are only saying that even if there is there is no issue of justice here entitling the trial court to look beyond the clear-cut stipulation of the parties.

B. It Necessarily Follows From the Pretrial Stipulation Dealt With Above That Appellant Was Not a Transferee of Borin Art Products Corporation.

Clearly if the sole stockholder of the corporation at the time of the distribution was a person other than appellant, then appellant did not own any stock in said corporation at that time. Whether appellant may have owned some stock at an earlier time is, of course, wholly immaterial, although, as we shall show, even that position is not true.

C. Clear Testimony Elicited by the Trial Court Shows That Appellant Never Owned Any Stock in the Borin Art Products Corporation.

The testimony referred to is that quoted above under Point I, at pp. 14-15. At the same point in the testimony appellant testified also that she never attended a meeting of the Board of Directors, or an annual meeting of the stockholders, and that not until 1945 did she know that the corporation had been dissolved in 1943 [R. 85-88].

Also, there is nothing in the Findings to show that she knew anything about the dissolution of the corporation or the formation of the partnership before 1945, when she

brought suit against Nathan Borin for divorce. Indeed, the Findings state that the partnership agreement was not personally signed by her, and that she didn't authorize anyone to sign it for her [R. 53, Fndg. XVI]. The return filed for her for 1944 was, pursuant to demand by an employee of her husband, signed by her in blank prior to initiation by her of a divorce proceeding, so that the information subsequently entered thereon, without her knowledge, as to income of a partnership, was not disclosed to her [R. 54, Fndg. XVIII; 91, 103-104, 106-108]. A similar return filed in her name in 1946 for 1945 was not even signed by her [R. 54-55, Fndg. XIX].

Since appellant knew nothing about the dissolution of the corporation, or the formation of the partnership, until 1945, then the Findings fail to explain how, if she was a shareholder, the corporation could have been dissolved in 1943, unless the dissolution papers were also falsified, the Illinois law requiring notice to all shareholders. (Illinois Rev. Stats., 1957 Ed., Ch. 32, Secs. 157.75-157.76.) Thus not even the Findings consistently contradict the clear testimony, elicited by the trial Court, that appellant never owned any stock in Borin Art Products Corporation.

D. There Is No Admissible Evidence in the Record Showing That Appellant Ever Owned Any Stock of Borin Art Products Corporation.

Appellant's Exhibit I, being a copy of the purported partnership agreement of Borin Art Products Company [R. 140-147 (partial)], must be disregarded in this connection because it was introduced, pursuant to the pretrial agreement, solely for the purpose of showing that appellant's signature thereon was a forgery [R. 17, par. B1]. When it was introduced reference was made to the

fact that it was introduced pursuant to that agreement [R. 99-100]. As already pointed out, the fact that her signature on said document was a forgery is clear [R. 81-83].

Appellee's Exhibit U, being an abstract of record in the divorce proceeding between appellant and Nathan Borin [R. 169-172 (partial)], must also be disregarded in this connection. That exhibit, which was not one of those listed in the pretrial order [R. 14-17], was repeatedly held by the trial court to be immaterial because it involved only a divorce action [R. 116-117, 133-134]. Indeed, the Court stated directly and explicitly that it based no conclusion upon that exhibit [R. 133, 135]. Because of these statements of the Court, appellant's counsel withdrew his own motion in the course of trial to have the document stricken [R. 139-140]. In a motion to strike the document after trial the trial court again repeated its references to the document as being immaterial and appellant's counsel accepted that result as final. We quote the following from R. 133-134:

> "Mr. Altman: In that case, if your Honor finds it is immaterial, why, I have no complaint.
>
> The Court: I didn't predicate my judgment upon that exhibit at all.
>
> Mr. Altman: Upon Exhibit U?
>
> The Court: No.
>
> Mr. Altman: Well, I think that is about it, then, your Honor."

On the same basis that all the divorce proceedings were immaterial the trial Court refused to admit the decree of the Illinois Court in that very divorce proceeding [R. 117-118, 126-127], although the latter document showed very clearly that the alleged partnership, Borin Art Products

Company, was a complete sham [R. 148-152]. The trial court also refused to allow appellant to show the actual settlement agreement between herself and Nathan Borin. As the record shows [R. 112-113], appellant attempted to show, by the attorney who handled the closing stages of her divorce proceeding against Nathan Borin, the actual out-of-court settlement that was made between them, showing the actual claims against him that she made and knew she was making. The fact would have been shown that she herself had no knowledge of any claims supposed to have been made by her of an interest in the alleged partnership [R. 113]. The Court, however, refused to allow that testimony.

That Exhibit U was objectionable is very clear. Not only was it immaterial as the trial Court stated; it was hearsay. It was prepared by attorneys for Nathan Borin, not by attorneys for Claire Borin, who was appellee there and is appellant here [R. 169]. Also, it conflicts with the clear stipulation of the parties in the pretrial conference order that prior to and at the time of the transfer of assets by Borin Art Products Corporation the stock of that corporation was owned entirely by the entity, Borin Art Products Company. The binding effect of that stipulation is shown elsewhere in this brief, at page 22.

The complaint referred to in Exhibit U, moreover, was drawn by appellant's attorneys from documents which she furnished them. She knew nothing about the contents of either those documents or the pleadings which they drew [R. 86, 88, 109, 130]. Also, it is signicant here that appellant never advised her attorneys in that proceeding that she was a partner [R. 109]. Indeed, all she did was turn over documents to them, not knowing what they contained [R. 86-88, 110], and signed papers for them,

not knowing what they contained [R. 110, 130]. This fact, which the trial Court itself found [R. 130], is very important. As stated in *Dwyer v. Dwyer,* 265 Ill. App. 155, at 157:

> "Allegations in pleadings are sometimes made by the attorneys drawing the pleadings, on a misunderstanding of the facts and not by authority of the party; and this may be shown. First Ruling Case Law, 500, citing *E. & W. T. R. Co. v. De Walt,* 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877."

And in *Brooks v. Brooks,* 63 Cal. App. 2d 671, at 675, the California Court gave effect to the party's lack of knowledge of the allegations of a pleading as follows:

> "A finding was made 'that it is true that defendant executed verified statements in the divorce action . . . in which it was stated that at the time of his proposal of marriage to defendant, plaintiff promised and agreed to pay defendant $80 per month . . . but the Court finds that defendant did not know that said statements were in the said verified statements, and that she signed said statements without knowledge that said statements were contained therein'."

As stated above, Exhibit 1 was introduced solely for the purpose of showing that appellant's signature thereon was a forgery. Nowhere in the record, absolutely nowhere, except for the said Exhibit 1 and the said Exhibit U, is there any reference to any ownership of stock by appellant. It follows that the record is wholly wanting in any admissible evidence that appellant ever owned any stock of Borin Art Products Corporation.

E. The Trial Court Erred in Failing to Grant Appellant's Motion for New Trial Based on Surprise, and on an Important Admission by Appellee, in Connection With the Question of Ownership of Stock in Borin Art Products Corporation.

In view of the trial Court's continued reference to Exhibit U as immaterial appellant disregarded it, as did the trial Court, until she was faced with a Finding by the trial Court that she had owned eighty shares of stock in Borin Art Products Corporation [R. 60-61]. Thus surprised, appellant first moved that the trial record show the limitation of the pretrial order in respect to the purpose of Exhibit 1 and that Exhibit U be stricken [R. 20-22]. In the hearing on that motion the trial Court again referred to Exhibit U as immaterial and again stated that it had ignored that exhibit [R. 133-134]. The Court denied that motion, however, without stating its reason [R. 58].

Thereafter appellant moved for a new trial [R. 59-65]. The motion was based largely on appellant's surprise at the finding of stock ownership by the Court despite complete absence of anything in the record to support it other than Exhibit 1 introduced only for the purpose of showing that appellant's name thereon was a forgery, and the said Exhibit U which the trial Court stated again and again it wholly disregarded.

The motion for new trial was also based [R. 60] upon the admission made by counsel for appellee, at the hearing on the prior motion, that the eighty shares which it alleged were "owned" by appellant were in effect merely issued in her name without her knowledge "prior to the dissolution of the corporation as part of the scheme for dissolution of the corporation and creating the partnership" [R. 136]. For this purpose appellant attached to the motion for new trial under affidavit two exhibits taken

from the administrative file of appellee. The one exhibit [R. 62-63] filed with the motion thoroughly supports the said admission made by appellee's counsel, and the other exhibit, lodged at the argument on the motion and also taken from appellee's administrative file [R. 69-70], showed that as of December 31, 1942, four months before the dissolution of the corporation, no stock stood in the name of appellant. As stated above appellant filed these two exhibits in support of the admission made by counsel for appellee, although, as we shall show below, such admission was sufficient in itself and needed no support.

That the said admission made by appellee was significant is shown in *Commission v. Tower, supra.* As there shown, ownership of stock set up for the mere purpose of a transfer from a corporation to a family portnership is a mere device and does not establish ownership of such stock for tax purposes. It is likewise shown in this Court's decision in *Jacob, et al. v. Commissioner, supra,* that a formal transfer of stock, where the benefits are retained by the transferor, cannot result in transferee liability.

The said admission by appellee is binding upon it. As stated by the Supreme Court in *Oscanyon v. Winchester Repeating Arms,* 103 U. S. 261, 263, 26 L. Ed. 539:

> "Indeed, any fact, bearing upon the issues involved, admitted by counsel may be the ground of the court's procedure as equally as if established by the clearest proof."

This is true also of an admission made after trial. 31 C. J. S. 1137; *The Harry* (D. C., N. Y.) 11 Fed. Cas. No. 6147, 9 Ben. 524.) This is likewise true of an admission made, as here, in the course of a hearing on a motion. (*Steiner v. Nelson* (C. A. 7), *supra.*) This is even

true of admissions made on appeal. (*O. F. Nelson & Co. v. United States* (C. A. 9), 149 F. 2d 692. See also *France Mfg. Co. v. Jefferson Electric Co.,* 106 F. 2d 605, *cert. den.* 309 U. S. 657, 60 S. Ct. 471, rehear. den., 309 U. S. 696, 60 S. Ct. 589; *New York Evening Post Co. v. Chaloner* (C. A. 2), 265 Fed. 204, cert. dismissed 252 U. S. 577, 40 S. Ct. 396; *Wiget v. Becker* (C. A. 8), 84 F. 2d 706.)

Appellee filed a memorandum in opposition to the motion for new trial [R. 66-68] but nowhere in that memorandum withdrew its admission referred to above or denied any of the facts set forth by appellant in her motion for new trial. In view of these circumstances the new trial certainly should have been granted.

A new trial may be granted in case of surprise. (*United States v. Kralmann* (D. C., Ky., 1943), 3 F. R. D. 473, 475.)

A new trial may be granted to prevent injustice. (*McCracken v. Richmond, F. & R.R. Co.* (C. A. 4, 1957), 240 F. 2d 484.)

A motion for new trial is proper for the purpose of pointing out errors to the trial court and for furnishing a record to the Court of Appeals for review of the trial court's action. (*Fine v. Paramount Pictures* (C. A. 7, 1950), 181 F. 2d 300, 302.)

A motion for new trial may also be made to give the trial court an opportunity to re-examine the entire factual situation and applicable law. (*Miller v. Pacific Mutual Life Ins. Co.* (D. C., Mich., 1954), 17 F. R. D. 121, 125, affirmed 228 F. 2d 889.)

The conclusion is clear, as appellant submits, that the motion for new trial should have been granted.

III.

The Entity Known as "Borin Art Products Company" Was Not in Fact a True and Bona Fide Partnership, as Assumed Necessarily in the Lower Court's Findings, but Was on the Contrary, as Shown by the Evidence, a Mere Sham and the Alter Ego of Nathan Borin.

The reference under this point is to Findings VI, VIII and IX [R. 49-50], and the implication of these findings in other findings.

A. Appellee Itself Treated the Said Entity as a Sham and the Alter Ego of Nathan Borin as Long as Nathan Borin Was Still Solvent.

As shown by the testimony [R. 120-122], the federal revenue office in Chicago in a conference with appellant told her that they were definitely of the opinion that the entire partnership was a mere dummy set up by Nathan Borin to evade taxes. Also, as it was stipulated by the parties here [R. 13], as late as March 30, 1950, the Treasury Department formally advised the appellant of an overassessment in her individual taxes for the years 1944, 1945, and 1946 based upon the conclusion that the income taxed to her as income from a partnership, Borin Art Products Company, was not her income but that of her husband Nathan Borin. Thereafter, as appellee informed the Court below, the partnership "went flat on its face and they [the purported partners] were held for the corporation taxes" [R. 105].

It is obvious that as long as there was money in the so-called partnership, Borin Art Products Company, the government took the position, clearly upon substantial evidence, and because of the higher tax which would result, that the partnership was a sham and the mere *alter ego*

of Nathan Borin. But after the said partnership went "flat on its face" the government, with collection on the higher tax base a vanishing possibility, reversed its position and attempted to hold that the partnership was valid and its purported members liable for the corporation taxes. This reversal of position by the government is sharply reminiscent of the one made for similar reasons, but blocked by this Court, in *Jacob, et al. v. Commissioner, supra.*

B. Appellee's Own Evidence Shows That the Said Entity Was a Mere Sham and the Alter Ego of Nathan Borin.

Appellee introduced into evidence as Exhibit T a complaint in chancery signed by appellant, by means of which she appeared to seek an accounting of the alleged partnership, Borin Art Products Company, as one of its limited members. We shall deal with that exhibit again, *infra,* in connection with the trial court's use of it as establishing an estoppel against appellant. For the purpose here we refer only to its contents showing on its face that the partnership was but a sham. We quote as follows from the document at R. 161, 162-163, and 164:

> "That during all of the time said partnership was in existence the same was entirely under the control, domination and direction of the defendant Nathan Borin; that the books of account of said partnership were maintained by the defendant Locker who acted as comptroller of said enterprise, but that said Locker made entries in the books of account in pursuance of the instructions and directions of the said defendant Borin and of no other person whatsoever.
>
> ". . . that in truth and in fact plaintiff [appellant here] has made no such withdrawals but that, at the direction of the defendant, Nathan Borin,

there has been charged to her account on said partnership books numerous items of expense which are in truth and in fact not chargeable to her; that the said defendant Borin, among other things, has charged to the plaintiff's account expenses of the parties in maintaining their household, purchases made for the minor daughter of the parties, items for articles which the said Nathan Borin had bestowed upon the plaintiff as gifts, items consisting of checks made payable to the plaintiff, which were fraudulently endorsed by the defendant, Borin, and by other persons at the direction of the defendant Borin, without the knowledge, consent or authority of the plaintiff, items of traveling expense for the plaintiff and defendant Borin for trips which they took together, items of attorneys' fees, which were the sole obligation of the defendant Borin, items concerning which this plaintiff has no knowledge, loans allegedly made by the defendant to brothers of the plaintiff, items lost by the defendant Borin as a result of playing cards and gambling, items for night club expenses and hotel bills of defendant, Borin and other persons unknown to plaintiff, a bill for a doctor who operated upon the minor child of the parties hereto and numerous other items of similar ilk;

* * * * * * * * *

"That defendant Borin has, on numerous occasions during the time that the partnership was in existence, charged as expenses of the partnership sundry amounts which are in truth and in fact directly chargeable to the said defendant; that plaintiff is informed and believes, and upon such information and belief states the fact to be that defendant Borin has charged vast sums of money which he has expended in night clubs, cabarets and other places of entertainment as partnership expenses, when, in fact, they were not; that he has charged numerous items

involving hotel bills for his own personal pleasure to the partnership as expenses; that he has charged the purchase and operation of two Cadillac automobiles to the partnership as firm expenses, when, in fact, they were for the individual use of the defendant Borin; that he has given lavish gifts costing substantial sums of money to various persons and charged the same as an expense of the partnership, when, in truth and in fact, said gifts were made solely for the individual benefit of the defendant Borin; that he has in numerous other ways *utilized the funds of the partnership for his own individual benefit* without charging the same to his individual account; . . ." (Italics supplied.)

Appellant, as the Findings show [R. 55, par. XX], never received anything as a result of the said complaint, Exhibit T. However, that complaint shows that the partnership was the same kind of fiction for tax evasion purposes as was required to be disregarded in *Tower v. Commissioner, supra,* explained in *Culbertson v. Commissioner,* 337 U. S. 733, 69 S. Ct. 1210; *Toor v. Westover* (C. A. 9), 200 F. 2d 713; *Alexander v. Commissioner* (C. A. 5), 194 F. 2d 921; and the numerous other family partnership cases which have come down during the last decade.

As to what constitutes a bona fide partnership it was stated in *Culbertson v. Commissioner, supra,* at 337 U. S. p. 742:

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capi-

> tal contributions, *the actual control of income and the purposes for which it is used,* and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." (Italics added.)

The same thing is true under the law of Illinois, where this partnership was purportedly created. It was there held in *Schmidt v. Balling,* 91 Ill. App. 388, that whether a partnership exists under a given state of facts is a question of law for the Court and not of fact for the jury. More specifically, it was held in *Cook v. Lauten,* 1 Ill. App. 2d 255, 117 N. E. 2d 414, that where an individual set up a purported partnership with his employee and the effect of the arrangement was nothing but an assignment of future income subject to such individual's right as "managing partner" to "direct [the employee's] withdrawal at his own discretion" that a true partnership did not exist. Essentially the same facts are present here. Thus even under Illinois partnership law the question is proper whether the purported partnership is in fact a true partnership, even though it is called a partnership in an agreement purportedly setting it up.

Moreover, it is established law that the meaning of a document is to be determined in the light of the manner in which it is actually carried out. Thus, in *Helvering v. Tex-Penn Oil Company,* 300 U. S. 481, 493, 57 S. Ct. 569, the Supreme Court stated that the validity of a finding "is to be tested by what in fact was done rather than by the mere form of words used and the writings employed."

Here, of course, appellant did not join in the enterprise at all; her name was forged on the purported partnership agreement. As the evidence above cited shows, more-

over, the so-called partners other than Nathan Borin were actually dummies. There was no good faith, no joining together, no present conduct by persons joined together. The "partnership" was, as appellee's counsel admitted in open court, an element in a "scheme" [R. 136].

C. The Exemplified Copy of a Decree of Divorce Which Appellant Offered for the Purpose of Showing That the Superior Court of Illinois Had in Effect Found the Partnership Nothing but a Sham Should Have Been Admitted.

For the purpose of showing the character of the alleged partnership, Borin Art Products Company, appellant offered in evidence an exemplified copy of a decree of the Superior Court of Cook County, Illinois, in the very proceeding which appellee's Exhibit U involved [R. 117-118, 125-126]. That decree, being Exhibit 12 for identification [R. 148-152], made no reference to any ownership of stock by appellant. On the contrary, it showed that Nathan Borin owned all the assets and appellant nothing. It stated that Nathan Borin withdrew from the Borin Art Products Company between April 1, 1944, and October 31, 1947, the sum of $118,120.52, and this "in addition to" $69,285.64 for the year 1945, $75,563.82 for the year 1946, and $65,911.45 for the year 1947, or a grand total for the three and one-half year period of $328,881.43, but that appellant did not even have the means to employ counsel to represent her [R. 151].

Thus that decree confirms the fact that Nathan Borin used the so-called partnership for his own individual purposes and that it was nothing but his *alter ego*. The Court below nevertheless refused to admit the document on the ground that it was in a divorce proceeding [R. 117-118, 125-126]. Appellant submits that it should have been admitted.

D. Even the Document Entitled "Agreement" Introduced by Appellant as Exhibit 1 for the Purpose Only of Showing That Appellant's Signature Thereon Was a Forgery Shows on Its Face That the Partnership Was Not Intended to Be Anything but a Sham and That the Interest Purportedly Received by Appellant in the Said Partnership Was Not in Fact a True or Bona Fide Interest.

1.

As the so-called agreement [R. 140-147] shows, Nathan Borin as "general partner" was given the authority to terminate the partnership at any time on six months notice [R. 143]. No corresponding power was given to any of the other partners. The interest of the limited partners was not transferable [R. 146], and Nathan Borin as general partner had the absolute right to purchase the interest of any limited partner at any time at book value [R. 147]. These precisely were the determining circumstances in the *Toor* case, *supra,* decided by this Court.

A salary is shown in the partnership agreement for appellant. The evidence is clear, however, that appellant was never an employee of Borin Art Products Company and never rendered any services to it [R. 93-94, 109, 122]. Salaries were also specified for the other so-called limited partners [R. 145] but it was provided that they could not receive them unless they were actively engaged in the partnership business and Nathan Borin reserved the power to discharge any one of them at any time, with or without cause [R. 146-147], and then, as above observed, repurchase the said employee's interest in the partnership at book value. There is a sentence which refers to "Further provision for the distribution of profits" [R. 146] but no such profits were ever distributed to appellant, as the Court below found [R. 55, par. XX], nor to any

other so-called limited partner, as appellee itself admitted [R. 105]. Nevertheless, Nathan Borin, according to appellee's own evidence, Exhibit T quoted above, withdrew large sums from the partnership. As further pointed out above, during a three and one-half year period he withdrew a total of $328,881.43. Thus, as the so-called partnership agreement was actually carried out, the so-called limited partners were nothing but employees, except for appellant who was not even that, and the distribution of profits made was entirely to Nathan Borin.

No more complete a fiction could have been devised than the so-called Borin Art Products Company. That for tax purposes such an entity could not be recognized is clear under the cases cited above. Under those cases there was no partnership but merely Nathan Borin doing business as Borin Art Products Company.

2.

The so-called agreement also indicates [R. 147, par. (20)] just how the scheme of dissolving the corporation and forming the partnership was enacted. Fictional transfers of stock were made, at specified prices, and Nathan Borin was to have a lien on any and all the profits of the partnership thereupon formed until those prices were paid. The partnership interests were also, as pointed out above, repurchasable by Nathan Borin, at any time, at book value, subject, of course, to the amount of such lien. Thus what happened, taking the document itself at face value, was a mere assignment of certain future income.

Looking outside the purported partnership agreement for a moment, the record does not show whether any of the stock resulting from the transfers referred to was ever delivered. Certainly none of it was delivered to

appellant. She was just never told about it [R. 85, 89]. Nor does the record show whether any part of the said purchase prices for the stock was ever paid. Certainly none was ever paid by appellant [R. 85]. The record does not even show whether any obligation to pay said prices was ever created.

The record does show, however, that nothing was ever paid *to* the so-called limited partners. Apparently, as appellee's evidence shows, the partnership plant burned down on January 10, 1946 [R. 160-161], but insurance in a total amount of $900,000.00 was paid [R. 105]. Appellant, however, never received anything, as the Court below found; nor did any of the others listed in the so-called agreement as limited partners, as appellee has conceded [R. 105]. Nevertheless, Nathan Borin, as already observed, withdrew several hundred thousand dollars from the partnership.

Taking the purported partnership agreement by itself, moreover, even without viewing the manner in which it was carried out, the alleged partnership interests just never came into existence. A transfer of property is not recognized for tax purposes unless the transfer is real and there is no contract, option or plan to repurchase. This has been held true where the transfer is in form a sale and a deduction for losses is involved. (5 Mertens, Sec. 28.28, p. 84; *Powell v. Commissioner* (1936), 34 B. T. A. 655; *Charles E. Mitchell v. Commissioner,* 32 B. T. A. 1093, affirmed (C. A. 2, 1937), 89 F. 2d 873; *Shoenberg v. Commissioner* (C. A. 8, 1935), 77 F. 2d 446, cert. den. 296 U. S. 586, 56 S. Ct. 101; *Commissioner v. Neaves* (C. A. 9, 1936), 81 F. 2d 947; *Foster v. Commissioner* (C. A. 2, 1938), 96 F. 2d 130; *Dupont v. Commissioner* (C. A. 3, 1941), 118 F. 2d 544.) The

same principle has been recognized in the case of voluntary transfers in connection with gift and estate taxes. Where a transfer is subject to a right to retake or reacquire it is incomplete. (*Reinecke v. Northern Trust Co.* (1929), 278 U. S. 339, 49 S. Ct. 123; *Helvering v. City Bank Farmers Trust Co.* (1936), 296 U. S. 85, 56 S. Ct. 70; *Helvering v. Stevens* (1936), 297 U. S. 693, 56 S. Ct. 443; *Burnet v. Guggenheim* (1933), 288 U. S. 280, 53 S. Ct. 369; *Sanford v. Commissioner* (1939), 308 U. S. 39, 60 S. Ct. 51; *Raskin v. Humphreys* (1939), 308 U. S. 54, 60 S. Ct. 60.)

The same point has been made in connection with voluntary transfers involved in income taxes. In such a case, *Corliss v. Bowers, Collector* (1930), 281 U. S. 376, 50 S. Ct. 336, the Supreme Court stated:

> "But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

The same principle has been expressly applied by this Court in the case of creation of partnership interests. (*Toor v. Westover, supra.*)

Thus it is immaterial what tax is involved and whether the transfer is in form a voluntary transfer or one made for consideration. If the transfer is subject to a right to retake, or even a plan to reacquire, the transfer is not recognized for tax purposes.

It is also a general rule that any transfer even though valid is not recognized for tax purposes if it amounts in effect to a mere assignment of future income. (*Lucas v. Earl* (1930), 281 U. S. 11, 50 S. Ct. 184; *Helvering v. Clifford* (1939), 309 U. S. 331, 60 S. Ct. 554.)

It must follow that the alleged limited partnership interests, including that of appellant, just never came into existence.

E. Finally, the Trial Court Itself Regarded the Partnership as a Sham.

The trial court stated [R. 115]:

> "I am satisfied, Mr. Altman, that *Mr. Borin treated this partnership as his own business.* He didn't ask his wife anything about it. He didn't pay her any dividends. He didn't give her anything. She didn't get anything out of it." (Italics added.)

And at R. 119:

> "If I was deciding this thing in the first instance, I am rather doubtful I would find there is a partnership . . .
>
> "But, however, even though there may not be a partnership, the plaintiff here, the taxpayer, assumed there was a partnership, acted as if there was a partnership . . ."

Thus the trial court itself regarded the partnership as a sham. It recognized the partnership in this proceeding only on the basis of some rule of estoppel. We shall deal with the subject of estoppel under Point V, *infra.*

IV.

The Trial Court's Findings (a) That Appellant Received a 10 Per Cent Interest in the Alleged Partnership, Borin Art Products Company, (b) That Said Interest Was Worth $12,000.00, and (c) That It Was Received "for" an Interest of Eighty (80) Shares in Said Corporation, Are Contrary to the Evidence and Also Inadequate.

The reference under this Point is to Findings VII and IX, R. 49, 50.

A. Appellant Never Received Any Such Interest at All.

The evidence is clear, as pointed out above, pages 15, 16 and 19, that appellant's name was not only inserted on the so-called partnership agreement by someone else without her authority, as the Court below found, but that it was made to simulate her signature and was therefore an actual forgery. It is obvious that there was no intent to deliver any interest to her and that her name was used thereon merely as a tax-reducing device.

Also, as fully detailed above under Point III, the partnership itself was a fiction so that the interest purportedly received by her under the document entitled "Agreement" was not in fact a true or bona fide interest in anything. Also, as shown above under Point III, Nathan Borin drew a total of $328,881.43 out of that business in a three and one-half year period while appellant, as the Court found, received nothing, just nothing at all.

We have already cited authority, pages 20, 35 above, to the effect that what is actually done governs the treatment for tax purposes, that a document is to be interpreted in the light of the manner in which it was actually carried out. What was actually done here by Nathan Borin was a scheme, a device, a deception.

Indeed, as we shall show under Point V, *infra,* the trial court based its conclusion that appellant had received a partnership interest, not at all upon any evidence showing that she had in fact received it, but upon estoppel.

B. There Is No Finding of the Actual Value of the Said Interest, and Such a Finding Is Necessary to Support Transferee Liability.

The Findings [R. 55, Fndg. XXI] refer to an "agreed value". The term "agreed" is taken from the alleged partnership agreement [R. 143-144]. That, of course, is the document on which appellant's name was forged. Nowhere in the record is there anything to show an agreement between the parties to *this* proceeding as to the value of the alleged partnership interest involved.

What must be shown, in any case, is the *actual* value of that which appellant received, if anything. (*Phillips v. Commissioner, supra; Phillips-Jones Corporation, et al. v. Parmley, supra.*) There is, nevertheless, no finding by the Court below of the actual value of said purported interest. As shown above under Point I, moreover, the burden was upon appellee to show such value.

Besides, under the express terms of the purported partnership agreement [R. 147], the said interest, if any, was subject to a lien for any amount due the "general partner", that is, Nathan Borin, in respect of the stock purportedly transferred to appellant. It may be assumed that this was the $12,000.00 amount shown in the document [R. 144]. Since the Findings show clearly that she never received anything from the partnership [R. 55] it would appear that the paper interest set up in her name in this forged document was at all times subject to a lien in favor of Nathan Borin for the full amount of the "agreed value"

of $12,000.00. It would follow that the net interest, if anything, received by her was zero.

Also, as the purported partnership agreement shows, the assets were to be transferred to the partnership "after payment of all just debts" [R. 142]. The instrument does not show what those debts are. Of course, they would include taxes due to the United States, not only the taxes involved here, which are for the years 1942 and 1943, but also any taxes for other years which had not been paid at the time of the transfer of assets by the corporation.

Deficiencies for 1940 and 1941, years not involved here, were determined *after* the transfer of assets [R. 13, par. 13*]. From the fact that the amount of $12,000.00 was also assessed against appellant in connection with the years 1940 and 1941, and the further fact that the taxes for those years were eventually paid [R. 13, par. 13], it must be that there were actual deficiencies for 1940 and 1941, determined after the transfer of assets involved, which were in the full amount of the "agreed value" shown in the partnership agreement. It would follow from this also that the value of the interest shown under appellant's name in that document was in any case zero and this without giving effect to the corporate tax deficiencies involved here for the years 1942 and 1943.

C. Since Appellant in Any Case Did Not Receive Such an Interest From the Corporation She Is Not Liable as a Transferee.

There is no Finding whatever that appellant ever received anything from the alleged transferor, Borin Art Products Corporation. As the pretrial stipulation ex-

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*See correction of par. 13 at R. 80.

pressly shows [R. 12], the stock was owned by the alleged partnership prior to the transfer of assets to it by the corporation. In other words, if any interest in the partnership was received in exchange for stock, it was so received prior to the transfer of assets by the corporation, and from the partnership, not from the corporation. There is nothing whatever in the Findings to the contrary. As the cases cited above under Point II A, at pages 21, 22, show, unless what appellant received was received by her from the corporation it cannot support transferee liability. It follows that the Findings themselves fail to support the conclusions of law and the judgment, in that they do not show the receipt of anything by appellant from the transferor, Borin Art Products Corporation.

V.

The Court's Finding That "Subsequent to the Execution of the Partnership Agreement, She [Appellant] Recognized and Ratified the Partnership Agreement, and Became Obligated Thereunder, as Fully as Though She Had Personally Placed Her Signature Thereon at the Time of Its Execution" Is Contrary to the Evidence; the Court's Finding of Liability Was Based Entirely on Estoppel.

The reference here is to Finding XVI, R. 53. A Conclusion of Law in substantially the same language is shown in Paragraph III, R. 56.

A. There Is No Evidence Anywhere in the Record of a Ratification of the Partnership Agreement by Appellant.

1.

The agreement referred to, Exhibit 1, is shown in the record at R. 140-147. Since appellant's signature on the said agreement was a forgery, ratification as distinguished from estoppel has no application here.

It is well settled that ratification of a forgery is subject to much narrower restrictions than ratification in general. (2 C. J. S. 1076.) In the case of a forged instrument a principal may become liable if his action induces the other party to change his position to his prejudice. "The rule in such case rests, however, on the doctrine of estoppel rather than that of ratification." 2 C. J. S. 1077, citing cases from numerous jurisdictions, including *Hefner v. Dawson,* 63 Ill. 403, 14 Am. Rep. 123. In *Chicago Edison Co. v. Fay,* 164 Ill. 323, 329, 45 N. E. 534, a contention that a forged instrument was ratified was rejected where the principal had not received "any such benefit . . . as to impose liability on him." To the same effect, *Mruk v. Chicago Title and Trust Co.,* 328 Ill. App. 402, 66 N. E. 2d 478. Here, of course, appellant never received any benefits [R. 132]. Even the Findings show this. Clearly then there was no ratification, as distinguished from estoppel, here.

2.

It is also true that the principle of ratification does not apply except where the person ratifying had full knowledge of all the facts. (2 C. J. S. 1081, *et seq.*) Here, of course, appellant, as already shown in this brief, had no knowledge of any of the facts. All she did was turn documents that she found, without any knowledge of their contents, over to her attorneys in connection with a divorce action, two years after the purported partnership was set up [R. 86, 88, 109, 110]. Since appellant never told her attorneys that she was a partner [R. 109], all that even the attorneys knew was what they found in those documents. Clearly the pleadings which they perpared, which she herself did not understand [R. 97-98], did not amount to a ratification by her. (*Dwyer v. Dwyer, supra.*)

3.

The term ratification has sometimes been used to mean estoppel. (2 C. J. S. Sec. 1070.)

It may be that that is what the Court below meant, since the Court stated expressly that it was basing its determination on the acts of appellant after the date of the alleged partnership agreement. The Court stated, as already quoted above [R. 119]:

> "If I was deciding this thing in the first instance, I am rather doubtful I would find there is a partnership. . . .
>
> But, however, even though there may not be a partnership, the plaintiff here, the taxpayer, assumed there was a partnership, acted as if there was a partnership. . . ."

The Court also stated there:

> "I would not find that the plaintiff in this action was bound by the partnership agreement under the evidence before me unless it had been for her actions after the date of the agreement."

The Court further stated [R. 130]:

> "It seems to me that Mrs. Borin is now *estopped* from denying the partnership, although if it hadn't been for her subsequent acts and conduct, I would feel she was not liable, but I am basing my opinion purely on the actions of Mrs. Borin. . . . I feel sorry for Mrs. Borin because I don't think she knew what was going on. . . ." (Italics added.)
>
> "I would like the findings to contain the express finding that I am finding Mrs. Borin liable because of her conduct subsequent to the first day of May, 1943. I think because of her conduct she is now *estopped* from denying that there was a partnership." (Italics added.)

At another point also the Court expressly stated that because of her actions to terminate the partnership agreement and for an accounting she was "estopped" from denying the partnership [R. 135-136].

Thus what we have before us is not a matter of simple ratification but a question of estoppel.

B. There Is Not a Single Item of Evidence Here to Support an Estoppel.

1.

The trial court, as above indicated, based its conclusion of estoppel entirely or primarily upon Exhibit T, a complaint in chancery signed by appellant which sought a termination of the partnership agreement and an accounting. The complaint was admitted over appellant's objections [R. 128]. Its principal clauses are shown in the record at R. 159-168 and a single paragraph of it is quoted in Finding XVII [R. 53-54].

This complaint was drawn by appellant's attorneys from documents given to them [R. 97, 110]. If Exhibit 1, the purported partnership agreement, was one of those documents, it was a document she never knew anything about [R. 93]. Nor did she ever tell her attorneys that she was a partner [R. 109, 113]. She thought only that they were protecting her interests in connection with the divorce [R. 97-98], and signed complaints in reliance upon them [R. 109].

Apparently the complaint was only in aid of the divorce proceeding. Indeed, appellee was unable to show that the complaint was ever prosecuted [R. 101]. The Court's Findings show clearly also that she never received anything [R. 55, Fndg. XX]. In fact, appellee admitted in open court that she never got anything [R. 105]. The

question therefore remains as to whether the mere execution of that complaint supports an estoppel against her denial of the fact alleged in that complaint that there was a partnership and that she was a member thereof.

As the Court below pointed out, the document is incomplete on its face [R. 99]. A mere complaint, moreover, under Illinois law does not bind the pleader but is intended merely to frame the issues. A litigant there may at any time before final judgment amend his pleading, and may even amend it after judgment, to conform to the proof. (Smith-Hurd Illinois Annotated Statutes, Civil Practice Act, Chap. 110, Sec. 46(3); *Wiedow v. Carpenter* (1941), 310 Ill. App. 342, 34 N. E. 2d 83; see *McCartney v. McCartney* (1956), 8 Ill. 2d 494, 134 N. E. 2d 789.)

Furthermore, as shown above, pages 32-34, this very Exhibit T upon which the Court based an estoppel shows on its face that the partnership was a mere sham and the *alter ego* of Nathan Borin.

Whether or not Exhibit T constituted admissible evidence, it certainly does not support an estoppel. As the Court below found, appellant never received anything from either the corporation or the partnership [R. 50, 55, Fndgs. IX, XX]; there was no benefit received and accepted by her [R. 132]. Nor does the record show that appellee ever relied upon the said Exhibit T, or upon any other document, act or representation to its detriment.

The essential elements of estoppel are summarized by this Court in *California State Board of Equalization v. Coast Radio Products* (C. A. 9, 1955), 228 F. 2d 520, 525, as follows:

> "Four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend

> that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." (See, also, 31 C. J. S. 254 (Sec. 67), 349 (Sec. 109b).)

These principles apply where estoppel is asserted on the basis of a pleading. (*General Petroleum Corporation v. Daugherty* (C. A. 9), 117 F. 2d 529, 535.)

Also, the burden of proving those elements of estoppel are always upon the party asserting it. (*Coen v. American Surety Co. of New York* (C. A. 8), 120 F. 2d 393, 31 C. J. S. 454, *cert. den.,* 314 U. S. 667, 62 S. Ct. 128.)

As the doctrine of estoppel rests on equity, a party is not estopped where the equities are in his favor. (31 C. J. S., Estoppel, Sec. 108, p. 346.) The foundation of equitable estoppel is in justice and good conscience. (2 Pom. Eq. Jur. 802; *Rothschild v. Title Guarantee and Trust Company,* 204 N. Y. 458, 97 N. E. 879; *Wheelock v. Commissioner* (C. A. 5, 1935), 77 F. 2d 474.) Here the Court below stated again and again that the equities were in appellant's favor [R. 105-106, 132], and appellee openly admitted that this is a "harsh case" [R. 108].

It must be borne in mind also that the liability of a transferee is based upon the trust fund doctrine. It is a proceeding in equity. (*Phillips v. Commissioner, supra; Phillips-Jones Corporation, et al. v. Parmley, supra,* 302 U. S. at 235-236.)

2.

The Court below also made some reference to a claim for refund filed with the revenue office [R. 129-130]. The body of the claim is set out at R. 172. It is clear that

the claim was not based upon any contention by appellant that she was a bona fide limited partner in Borin Art Products Company. On the contrary, the basis of the claim is that she was not such a partner and that she was merely so designated for tax purposes by her then husband, Nathan Borin.

Besides, there was attached to the claim the letter from the government dated March 30, 1950, covered by the pretrial order [R. 13]. There were in fact three such claims, Government Exhibits W, X, and Y [R. 122-123], for the years and in the amounts shown in the said letter of March 30, 1950. The letter was attached to the first of these claims but all three claims were filed at the same time together with the said letter.*

In the first place, appellant signed these claims at the request of her attorney or accountant without knowing what they were about [R. 122-124]. She did not even know whether the amounts shown were ever paid. She just signed the papers at her accountant's request [R. 124-125]. In the second place, it is clear from the said letter of March 30, 1950, attached to the first of these claims, Exhibit W, that these claims were based upon the formal representation by the government that appellant was entitled to the amounts shown. What the government obviously intended by that letter was to offset over-

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*Because of the reference to the letter in the pretrial order appellant failed to request that it be printed as a part of Government's Exhibit W. It is a part of the unprinted record in this Court. The inclusion of the said letter as a part of that exhibit was specifically requested in the "Second Amendment to Designation of Contents of Record on Appeal" filed by appellant but the clerk's certificate [R. 78] fails to show that fact in reference to the said exhibit. Appellant will ask for its printing if the court or appellee so suggests.

assessments in favor of appellant against deficiencies against Nathan Borin. Only appellant could have filed these claims, even though they were to be so offset. (I. R. C. 1939, Sec. 322(b)(1), 10 Mertens Sec. 58.05.) In effect then the filing of these claims was induced by the government for its own benefit.

There is no indication anywhere that these claims were filed for any other purpose, that appellant actually intended to collect any money by means of them, that the government ever paid any money out by means of them, or in reliance on said claim or claims. As the record shows, moreover, appellant offered to waive the said claims [R. 125].

There is nothing whatever in the said claim or claims to support an estoppel. On the contrary they show on their face that the partnership was a sham.

3.

The Court below also made a general reference to "certain papers that she [appellant] filed with the Internal Revenue Department." Apparently the Court there had reference to the extensions of time referred to in Finding X [R. 50], and to the so-called "Transferee agreement" set out in Finding XI [R. 50-51].

As to the transferee agreements referred to in Finding XI, which appellant signed like the many other documents at the request of her accountant without knowing what they were [R. 130], these documents, admitted into evidence over appellant's objections [R. 127-128], were agreements recognizing that appellant was the transferee "to the extent of her liability as a transferee under the Internal Revenue Code" [R. 51]. But that is the very

liability which is here in question. Obviously then this document merely begs the question.

Moreover, the document says "In consideration of the Commissioner of Internal Revenue not issuing a statutory notice of deficiency to and making an assessment against Borin Art Products Corporation" [R. 50-51]. But the Commissioner did make such an assessment [R. 49, Fndg. V] for the years there involved. Obviously then, if this transferee agreement was an agreement, then the Commissioner violated it and certainly is not in a position here to rely upon it.

By the same token the final sentence of Finding XI [R. 51] is clearly contrary to the evidence. The evidence does not show a single thing which the Commissioner did in reliance upon those documents. On the contrary, since he disregarded these "transferee agreements" and made the assessment, then certainly he did not rely upon them. Furthermore, while the said "transferee agreements" are dated February 8, 1946 [R. 50-51], the Commissioner ruled, as late as March 30, 1950 [R. 13], that appellant was not a member of the partnership and that her so-called interest was in fact owned by Nathan Borin. Plainly the final sentence of Finding XI is contrary to completely uncontradicted evidence.

We submit also that for one not lettered in the law and unfamiliar with business practices [R. 109] these documents do not speak for themselves.

As to the extensions of time referred to in Finding X [R. 50], certainly they constitute no support for an estoppel, or even evidence of anything. They are extensions of the time in which things are to be determined. They are not determinations within themselves. Certainly a mere

agreement to an extension of time for assessment is not recognition of the liability alleged by the government. This completely begs the question.*

Lastly, as to the partnership returns, Exhibits P, Q, R, and S [R. 155-158], introduced by appellee over appellant's objections [R. 97, 128], they were not, as the record cited shows, put in through any witness, or in any proper way identified, and there is nothing whatever on them to show that appellant ever knew that they even existed. Clearly they are the sheerest form of hearsay.

Appellee by requesting the inclusion of those returns as a part of the printed record here, and by including in the Findings the extension of time and "transferee agreements" referred to above, apparently considered them essential to the judgment. We submit that the admission of any and all of these various documents was reversible error.

C. Estoppel Requires That It Must Be Pleaded by the Person Asserting It and There Is No Such Pleading Here.

Estoppel must be pleaded by the person asserting it. (*Bowles v. Capital Packing Co.* (C. A. 10), 143 F. 2d 87; *Strouhal v. Allied Development Co.* (C. A. 10), 220 F. 2d 541, 544.) There is no such pleading here. For this reason, as well as the others cited above, it follows of necessity that estoppel cannot be applied here.

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*The waiver form shown in Finding XII [R. 52], which appellant was led to believe was also a mere extension of time, is fully covered above, pp. 16-17.

VI.

Appellee Failed to Plead, or Offer Any Proof, That the Taxes of the Alleged Transferor Had Not Been Paid, and There Is No Finding of Such Nonpayment.

A. For This Purpose It Was Incumbent Upon the Government to Allege and Prove Nonpayment of the Tax of the Alleged Transferor, Borin Art Products Corporation, and No Such Allegation or Proof Was Made.

The assessment against a transferee is not limited to such transferee's pro rata share of tax. The Commissioner may *assess* each transferee to the full extent of the amount received by him, even though the total thus assessed against all of the transferees exceeds the full amount of the transferor's liability. (*Phillips v. Commissioner, supra.*)

Of course, the Commissioner may not *collect* from all of the transferees more than the full amount of the transferor's liability. (*Phillips-Jones Corporation v. Parmley, supra,* 302 U. S. at 237.) It necessarily follows that there must be allegation and proof, not only of the value of the assets transferred, but also that, *regardless of whether the assessment against the particular transferee has been paid or not,* the transferor's indebtedness in respect to which the assessment was made has not already been paid. (9 Mertens, Sec. 53.25.)

Here, however, there is neither allegation nor proof, nor even a Finding, that the taxes of the alleged transferor remain unpaid.

The lower court did find [R. 53] that "No part of any of said unpaid balances has been paid." The reference is, however, to the assessment against appellant. As *Phillips v. Commissioner, supra,* shows, it may have assessed the

full amount of the tax against each and every one of the alleged transferees. It would be enough if payments by the others aggregated the tax liability of the transferor. There is certainly no need of specific payment of the liability asserted against appellant.

Thus we have neither allegation nor proof nor a Finding that the taxes of the transferor have not been paid. Indeed, appellee at the trial made it clear that it had no knowledge on this subject [R. 104]. The colloquy referred to is the following:

> "The Court: May I inquire, have you collected taxes from the other members of the partnership?
> Mr. Messer: I do not know that, your Honor. That was in Chicago. That is not part of the Government's case."

Nor is it here merely a matter of speculative possibility. As the record shows, taxes of the corporation for 1940 and 1941 were paid, after its dissolution, by persons other than appellant [R. 13]. There is no reason to suppose that the same thing could not have happened for the years involved here, 1942 and 1943. Certainly these are facts which the government could prove, and at the same time facts which would not ordinarily be in the knowledge of appellant.

It follows for this reason alone that the judgment below is unsupported by the record.

VII.

Appellant Was at Most a Limited Partner and a Limited Partner Under the Law of Illinois Is Not Liable for Any of the Debts of the Partnership.

As the Findings show, the assets of the corporation were transferred directly to the alleged partnership, Borin Art Products Company [R. 49, Fndg. VI]. Appellant had no part in any way in the transfer [R. 53, Fndg. XVI]. Indeed, her signature on the so-called partnership agreement was forged [R. 81-83]. What the Findings state is that appellant, because of *subsequent* acts, became a *limited* partner in the said entity [R. 49-50, Fndg. VIII; R. 53, Fndg. XVI].

As pointed out above under Point I, page 18, appellant's obligation, if any, is determined under the law of the State of Illinois. Assuming then that she was a limited partner, what is her liability? A limited partner under Illinois law, as is also true under the law of California and most other states, is liable only to the extent of his investment; that is, his investment can be lost but no additional amount can be collected from him. (Smith-Hurd Ill. Ann. Stat., Chap. 106½, Secs. 44, 60(1), (4); Illinois Law and Practice, Vol. 29, Partnerships, Sec. 303; *In re Marcuse & Co.* (C. A. 7), 281 Fed. 929, affirmed in *Giles v. Vette,* 263 U. S. 553, 44 S. Ct. 157; *Henningson v. Howard,* 117 Cal. App. 2d 352.)

It follows clearly that by no possibility and even under the factual pattern asserted by appellee could any amount be collected from appellant here.

VIII.

If Appellant Did Receive Any Assets as a Transferee Her Resulting Liability Was Exhausted by the Payments Made on an Assessment Against Her for the Corporate Taxes of Years Prior to Those Here Involved.

It was stipulated in the pretrial conference order [R. 13] that an assessment was made against appellant in the amount of $12,000.00 as alleged transferee of Borin Art Products Corporation in respect of its income and excess profits taxes for the years 1940 and 1941, because of the distribution upon dissolution of said corporation. It is also there stipulated that the said assessment was subsequently paid, albeit by persons other than appellant.

A person's liability may of course be liquidated by payment by others as well as by a payment by himself. (*Phillips-Jones Corporation v. Parmley, supra.*)

It is clear then that if appellant was liable as a transferee to the extent of $12,000.00, as the Court below has found, then that liability was liquidated by the said payment on taxes for 1940 and 1941.

Conclusion.

In conclusion, appellant submits that the judgment entered below was erroneous, and that appellant is not liable as a transferee of Borin Art Products Corporation.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Appellant.

APPENDIX.

I. R. C. 1939.

Section 272. Procedure in General.

(a)(1) Petition to Board of Tax Appeals.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. . . .

(d) Waiver of Restrictions.—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

Section 311. Transferred Assets.

(a) Method of Collection.—The amounts of the following liabilities shall, except as hereinafter in this section

provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) Transferees.—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

Section 322. Refunds and Credits.

(b) Limitation on Allowance.—

(1) Period of Limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. . . .

Smith-Hurd Ill. Annotated Stats., Chapter 106½.

Section 44. Definition of Limited Partnership.

A limited partnership is a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

Sec. 60. Liability of Limited Partner to Partnership—Waiver or Compromise of Liabilities.

(1) A limited partner is liable to the partnership

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make. . . .

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

Smith-Hurd Ill. Annotated Stats., Chapter 110.

Section 46. Amendments.

(3) A pleading may be amended at any time before or after judgment, to conform the pleading to the proofs, upon terms as to costs and continuance that may be just. Illinois Rev. Stats., 1957 Ed., Chapter 32.

Section 157.75. Election to Dissolve Voluntarily by Consent of Shareholders.

A corporation may elect to dissolve voluntarily and wind up its affairs by the written consent of the holders of record of all of its outstanding shares, in the following manner:

Upon the execution of such written consent by all the shareholders of record, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or a vice-president, and verified by him, and the

corporate seal shall be thereto affixed, attested by the secretary or assistant secretary, which shall set forth and contain:

* * * * * * * * *

(d) The agreement signed by all shareholders of record of the corporation consenting to its dissolution.

(e) That such agreement is signed by all shareholders of record of the corporation or signed in their names by their attorneys thereunto duly authorized.

Section 157.76. Election to Dissolve Voluntarily by act of corporation.

A corporation may elect to dissolve voluntarily and wind up its affairs by the act of the corporation in the following manner:

(a) The board of directors shall adopt a resolution recommending that the corporation be dissolved voluntarily, and directing that the question of such dissolution be submitted to a vote at a meeting of shareholders which may be either an annual or special meeting.

(b) Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of voluntarily dissolving the corporation, shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders. If such meeting be an annual meeting such purpose may be included in the notice of such annual meeting.